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NOTES.

JURISDICTION OF A NEUTRAL FORUM OVER CONTRACTS BETWEEN BELLIGERENT ALIENS.—The situation in the courts of belligerent nations of contracts to which alien enemies are parties is well defined in English and American jurisprudence. Agreements between enemies which originate during wartime are for the most part void.[1] The outbreak of hostilities paralyzes temporarily the obligations of contracts made before the commencement of the *status belli,* if it does not dissolve them altogether.[2] Strangely enough, however, there

[1] 7 Moore, Digest of International Law, 244. But certain contracts made during hostilities by prisoners of war are valid, although their status is somewhat peculiar. Baty & Morgan, War, Its Conduct and Legal Results, 283.

[2] An alien enemy may always be sued in a belligerent court during hostilities, provided the court can acquire jurisdiction. 7 Moore, Digest of International Law, 253. But only under very special circumstances may he institute a suit. Trotter, Law of Contract During War, 51-52. Contracts performed by an alien enemy before the war will be suspended until its close if capable of surviving such suspension. Otherwise they will be dissolved. This rule seems to apply also to executory agreements made prior to hostilities. Trotter, Law of Contract During War, 37-48.

seems to be little or no law dealing with a subject very closely related—namely, agreements between belligerent aliens presented for adjudication in neutral tribunals. The dearth of authority is revealed in two recent American decisions, *Compagnie U. D. T., Etc.* v. *U. S. Service Corporation et al.* (N. J. 1915) 95 Atl. 187, and *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione* (D. C., E. D., N. Y. 1915) 224 Fed. 188. In the New Jersey case the Court of Chancery decreed specific performance by a German corporation of a contract made before the outbreak of war with a French company and calling for the transfer to the latter of the land on which is erected the wireless station at Tuckerton, N. J. In the Federal decision, however, a libel brought in the United States against a vessel of the defendant Austrian corporation for coal supplied abroad by the English plaintiffs prior to hostilities, was dismissed, the court asserting that a neutral tribunal could not take jurisdiction with propriety since "the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war."

In arriving at its decision the federal court seems to proceed upon the theory that a universal law common to all nations prohibits, during war, all intercourse between subjects of belligerent countries, regardless of the geographical location of the individual citizen. Such, indeed, appears to be the law of Germany, which, according to a statute mentioned in the New Jersey case, imposes upon all German subjects the duty of absolute non-intercourse with enemies of the Empire, as well as forbidding dealings by its citizens with persons residing within enemy territory. But in concluding that equally comprehensive prohibitions are to be found in English law, the court apparently overlooks entirely a very important distinction drawn by Great Britain. England's war policy always has been aimed primarily at cutting off traffic and commercial intercourse with the enemy's country.[3] Consequently the geographical situation of the person with whom an English subject is carrying on transactions during wartime is the vital factor in determining whether the dealings are interdicted by English law; and the nationality of the other person is of secondary importance at best.[4] The distinction between the tests of geographical location and hostile nationality is recognized by the "Trading With the Enemy Proclamation, No. 2, 1914" which, while it forbids, *inter alia,* payments to persons residing or carrying on business in enemy countries, excludes expressly from its prohibitions, dealings with enemy subjects residing or engaged in business outside enemy territory.[5] It is, therefore, quite incorrect to declare that English law forbids every English citizen to make a payment during

[3]Baty & Morgan, War, Its Conduct and Legal Results, 294 *et seq.*

[4]M'Connell *v.* Hector (1802) 3 Bos. & P. 113; See Jenson *v.* Driefontein Cons. Mines [1902] A. C. 484, 505; Trotter, Law of Contract During War, 7-16. *Cf.* The preamble of the English "Trading with the Enemy Proclamation, No. 2, 1914."

[5]"Trading With the Enemy Proclamation, No. 2, 1914," § 5 (1) as qualified by § 3. (To be found in Trotter, Law of Contract During War, 398-400. And see comment on p. 26.) If the nationality of the litigating parties in the principal federal court case were reversed, an interesting question would arise over the interpretation of the portion of the Proclamation dealing with enemy corporations. The plaintiff then would be a German corporation "incorporated in an enemy country," and doing business there, yet at the same time carrying on business in a neutral country outside enemy territory.

wartime to any enemy subject wherever the latter may be.[6] Consequently, the sweeping conclusions reached in the federal case as to the mutual total prohibition of intercourse between their citizens by England and Austria appear to be unwarranted even if we accept the assumption made by the court, for want of proof, that the Austrian law and the English happen to be identical. It seems more reasonable to suppose, moreover, in the total absence of authority, that the law of Austria resembles instead that of Germany. Clearly the findings of foreign law made by the court appear to be erroneous or conjectural, and an examination of that law, disproves rather than confirms the existence of any universal rule. Equally unconvincing appears to be the reasoning by which a law "common to the belligerents and to the neutral forum" is declared to be binding upon the neutral tribunal so as to force it to throw the plaintiff out of court. There may, indeed, be a uniform law common to all three nations concerned; but if there be, it is a law determining not the status of alien belligerents suing each other in the courts of a neutral nation but law settling the position of alien enemies in the courts of a belligerent.

The question remains whether it is unneutral conduct for American tribunals to entertain suits on contracts between belligerent aliens. The federal decision says in effect that it is unneutral to permit any belligerent alien to maintain a suit in our courts against one of his enemies. The New Jersey case declares that it is not unneutral if we extend impartially the right to sue, to every belligerent alien, regardless of his nationality, who enjoys a *bona fide* cause of action against an enemy. This latter view seems preferable, since neutrality consists not so much in preventing all belligerents from utilizing neutral resources as in affording to all equal facilities of approach to these resources. Nor is there any apparent reason why access to the courts should not stand upon this same footing.

Prevention of all suits on contracts the parties to which happened to be subjects of foreign nations at war would result in an unreasonable curtailment of the proper and necessary sphere of jurisdiction of our courts. Yet if the doctrine of the federal decision were carried to its logical extreme such would be its tendency. A compromise rule whereby each alien defendant would be held liable only on those contracts with enemy subjects which happen to be made or to be capable of enforcement under circumstances not rendered illegal by the war measures passed by his own country might be defensible from the viewpoint of strict logic. But practically, it would result in virtual discrimination against the subjects of those countries affecting the least drastic disabling acts, since the statutes of the several nations are by no means uniform;[7] to say nothing of the extra-territorial enforcement of measures engendered in bitterness and with the avowed intention of crippling nations with which we are at peace.[8]

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[6]The greater liberality of the English law is well illustrated by an early decision. Bell *v.* Reid (1813) 1 M. & S. 726. By the ruling of that case an English subject residing in America was held to be entitled to enjoy the commercial benefits and privileges belonging to American citizens and to maintain intercourse during wartime with England's enemies.

[7]Compare, for example, the German and English statutes mentioned and discussed further in the main body of this note.

[8]If foreign disabling acts aimed at enemy plaintiffs must remain unenforcible in neutral courts, it seems to follow as a necessary complement

The safest and most impartial policy for our tribunals to adopt requires that they disregard as much as possible the existence of a *status belli* and enforce contracts between alien belligerents exactly as if matters were on a peace footing,[9] except in cases where the enforcement would either result in a breach of our neutrality, or involve our courts in the determination of questions wholly political in nature.

TRIAL BY JURY IN HABEAS CORPUS PROCEEDINGS.—To the many important legal points that have come before the courts for determination in the course of the litigation connected with the notorious case of Harry K. Thaw, there has been added the question of a judge's right to call a jury in habeas corpus proceedings. The New York Court of Appeals, by refusing to grant a prohibition against the justice hearing the return of the writ, has held that a judge to whom the Chancellor's powers has descended, may in habeas corpus proceedings follow the equitable practice of summoning a jury to render an advisory verdict. *People ex rel. Woodbury* v. *Hendrick* (1915) 215 N. Y. 339. Accepting the holding that such a course is consistent with the Code provision for a summary hearing,[1] we still find the applicability of the equitable procedure not without difficulties.

The writs of habeas corpus in various forms were originally mere writs of procedure,[2] but from them developed the high prerogative writ which has been considered of such importance as a means of securing the personal liberty of the individual, that its inviolacy has been assured by provisions in the Federal Constitution[3] and the constitutions of most of the states.[4] The writ was in common use in King's Bench from early times, and the earlier writers asserted the Chancellor's right to issue it,[5] especially in vacation.[6] Its infrequent use in Chancery, however, led doubts to be cast upon that court's

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that these tribunals should refuse to apply war measures designed to give friendly plaintiffs penal advantages.

[9]The federal case might be distinguished from the New Jersey decision on the ground that the contract litigated in the latter called for transfer of land situate within the state and consequently, that greater reason existed for the court to take jurisdiction. Significantly enough, however, the New Jersey court does not confine itself to this point, evidently inclining toward the view that the transfer of land located in the jurisdiction is but one of many rights an alien belligerent ought to be entitled to enforce in a neutral tribunal against his enemy. But see 81 Central Law Journal, 217.

[1]N. Y. Code Civ. Proc., § 2039. Although provisions that hearings be summary are usually held to allow of slight delays, *Ex parte* Ryan (1909) 124 La. 356, the principal case recognizes that a jury trial would not be permissible in cases where a jury could not be promptly procured.

[2]Holdsworth, History of English Law, 97.

[3]U. S. Const., Art. I, § 9.

[4]Church, Habeas Corpus (2nd ed.) § 47; 2 Spelling, Injunctions (2nd ed.) § 1159.

[5]4 Coke, Inst., 81; 2 Hale, Pleas of the Crown, 145, 147; Bac. Abr., "Habeas Corpus" (B) § 1.

[6]The right was not usually exercised in term time, the custom being to refer the matter to the law courts in order "to facilitate the administration of justice, by equalizing as far as may be, the calls upon the time of the judges." Rowe's Case (1828) 1 Molloy 280.